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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re B.A., et al., Persons Coming Under
the Juvenile Court Law.

H034315
(Monterey County
Super. Ct. Nos. J42145, J42156 &
J42147)

MONTEREY COUNTY DEPARTMENT
OF SOCIAL AND EMPLOYMENT
SERVICES,

Plaintiff and Respondent,

v.

M.A.,

Defendant and Appellant.

M.A. appeals the trial court's ruling terminating her parental rights to her three children. On appeal, she asserts the court erred in finding the parent-child bond exception to termination did not apply. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i)).¹

¹ All further statutory references are to the Welfare and Institutions Code.

STATEMENT OF THE CASE AND FACTS

In May 2007, the Monterey County Department of Social Services (Department) filed a section 300 petition on the three children who are the subject of this appeal: B.A., a girl aged 8 years, Y.A., a girl aged 2 years 11 months, and O.A., a boy aged 1 year 9 months. The children had been removed from M.A.'s (mother) and V.A.'s (father) home, because B.A. accused her father of sexually molesting her at least 10 times when she was five years old. B.A. alleged her father had had sexual intercourse with her, and that he covered her mouth to prevent her from calling out for help. Father also told B.A. not to tell anyone. B.A. told her mother about the abuse, and her mother took the keys to B.A.'s bedroom from the father. Mother also told B.A. not to tell anyone about the abuse.

In June 2007, the Department filed a report for the detention hearing, stating that all three children were placed with the maternal grandparents, who lived next door to mother, and had provided day care for the children their entire lives.

On July 17, 2007, the social worker filed her report for the jurisdictional and dispositional hearing, stating that the children appeared to be bonded with mother. The report also stated that the grandparents reported B.A. was afraid to go to sleep by herself, because she worried her parents would come and take her away. The report recommended that reunification services be provided to mother, but not to father.

On July 20, 2007, the court sustained jurisdiction and set the matter for a six-month review hearing on January 11, 2008.

On December 28, 2007, the social worker filed her report for the six month review hearing in which she stated that father had been arrested on June 16, 2007 for the sexual abuse of B.A., and mother had been off work since father's arrest. The children remained in their placement with the maternal grandparents. The report stated that mother was working towards her reunification requirements, and was consistent with her visits. After

her visits became unsupervised, however, mother initiated four cell phone calls between B.A. and her father. Because mother allowed this contact with the father, the visits went back to being supervised.

The report stated that mother was bonded with the children, but that she would not acknowledge that father had sexually molested B.A. The social worker recommended that reunification services continue for the mother, and that the father should continue to have no visits with the children.

On January 11, 2008, the court held an uncontested six-month review hearing during which it continued reunification services for mother and set the 12-month permanency hearing for July 11, 2008.

On June 30, 2008, the social worker filed her report for the 12-month permanency hearing in which she recommended that reunification services to the mother be terminated and the matter be set for a hearing under section 366.26. The report noted that all three children continued to do well in the placement with their grandparents, mother continued to live next door to the children, and mother had been off work since father's arrest. Mother had been working towards reunification, but was experiencing depression since father was arrested. Mother still could not believe her husband had molested B.A. The report stated that mother still had contact with father, despite a no-contact order between them. Other family members reported mother was angry at them for reporting the sexual abuse in the first place.

The report also stated that B.A. was afraid to return home to mother for fear mother would reunify her with her father. B.A. did not trust mother's ability to protect her from further abuse. In the report, the social worker stated: "After a year of services, the mother still does not believe that her daughter was sexually abused, still is angry at her family for reporting the abuse, and still has not been able to demonstrate concretely that she no longer wishes to be in a relationship with the father."

In August 2008, the court proceeded with an uncontested 12-month review hearing, adopted the findings and recommendations in the social worker's report and set the matter for a selection and implementation hearing pursuant to section 366.26.

In October 2008, the social worker filed her report for the first selection and implementation hearing. The report recommended that parental rights be terminated, and adoption be made the permanent plan for the children.

With regard to the issue of adoptability, the report stated that B.A. was an intelligent and outgoing child, but was still suffering the effects of the sexual abuse. Mother continued to deny that the abuse occurred, so it was not possible for mother to participate in family therapy with B.A. The report stated that Y.A. was a healthy 4-year-old girl, with no significant developmental, behavioral or emotional problems. O.A. was a healthy 3-year-old boy with no significant developmental, behavioral or emotional problems.

The report stated that B.A. wanted to be adopted by her grandparents because she did not believe her mother would protect her. O.A. and Y.A. were too young to understand adoption, but were happy in their grandparents' home. All three children were bonded with their grandparents.

In November 2008, mother requested a contested hearing. Mother's trial brief for the contested hearing stated, "Mother strongly feels these allegations are, at best, unproved and she does not accept that [father] is actually guilty of anything. She feels she wishes to 'honor her daughter,' but cannot conclude that B.A. is speaking the truth." Mother argued the parent-child bond exception to termination under section 366.26 subdivision (c)(1)(B)(i) applied to this case, and that guardianship should be the permanent plan rather than adoption.

On December 3, 2008, the court held the selection and implementation hearing. After meeting with attorneys in chambers, the court represented that the parties had

reached a resolution. The court ordered a legal guardianship for the children, to which all the parties agreed. The court did not dismiss the dependency, and did not set a further hearing.

On December 17, 2008, the attorney for the three children filed a request for a calendar setting, asking that the matter be put on calendar for reconsideration of the court's decision ordering legal guardianship because of new evidence. The court set the matter for February 11, 2009, for a motion for reconsideration.

On February 3, 2009, the grandparents filed a motion for reconsideration of the guardianship. In their declaration accompanying the motion, the grandparents stated that B.A. was afraid to go with her mother, because the mother still did not believe B.A. had been sexually abused. The grandparents said they wanted to adopt the children, and that B.A. wanted to be adopted because she was afraid to return to her mother who did not protect her.

The court granted the motion for reconsideration, and set the matter for a new section 366.26 hearing in March 2009.

On March 16, 2009, the social worker filed an addendum report for the section 266.26 hearing in which she again recommended termination of parental rights and adoption as the permanent plan for the children. The report stated that B.A. continued to express her desire to be adopted by the grandparents, and wrote a note to that effect that was included in the report.

In April 2009, the court held a contested hearing. B.A. testified that she did not remember the last time her mother visited, but that she had enjoyed the visit and that her siblings also enjoyed it. B.A. stated that she wrote the note to the judge herself, because she wanted the judge to help her stay with her grandparents. B.A. also stated that she understood that adoption meant that her grandparents would become her parents, and they would be in charge of her. She also stated that if her grandparents adopted her, she

would be safe, and her siblings would be safe too. B.A. stated that earlier her mother told her to tell the judge that she wanted to stay with her mom. However, B.A. did not want to stay with her mom, because there were times when she did not feel safe with her mother, and she feared her mother would not protect her siblings.

The social worker also testified at the hearing. She stated that in general, O.A. and Y.A. interacted positively with the mother during supervised visits, but that B.A. did not interact as much with her mother. She stated her opinion that the children would not benefit from continued contact or visits with the mother. She also stated that she had become concerned during recent visits because the mother was attempting to exercise influence over the children, and that this was harmful to them, such that mother's visits had been suspended. The social worker also stated that mother did not respect the grandparent's rights as guardians, and this made it hard for the grandparents to control the mother's visitation with the children.

Both the grandfather and grandmother testified at the hearing. They both stated they wanted to adopt the children, so they could provide them stability and safety. The grandfather stated that he believed the children would be better off at his house than with their mother, and that the permanence of adoption would be the best way to protect the children.

Mother testified at the hearing. She stated she wanted desperately to be with her children, and that she wanted the court to order a guardianship, rather than an adoption. She also stated that she believed the grandparents could provide a stable home for the children.

On April 10, 2009, the court terminated parental rights and ruled that adoption would be the children's permanent plan. The court found by clear and convincing evidence that all three children were adoptable. The court also found the parent-child bond exception to termination of parental rights did not apply to B.A., nor did it apply to

her younger siblings O.A. and Y.A. The court expressed that the overriding consideration was the children's need for permanence.

DISCUSSION

Mother asserts the trial court erred in failing to apply the parent-child bond exception to termination of parental rights under section 366.26, subd. (c)(1)(B)(i), which provides that the court shall terminate parental rights unless "The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

Specifically, mother argues there is no substantial evidence to support the trial court's finding that the parent-child bond exception did not apply, and the trial court erred in considering the children's suitable placement and their grandparents' willingness to continue mother's visitation with the children as factors in determining whether the parent-child bond exception applied.

Substantial Evidence

In a hearing on a section 366.26 petition, once the Department has shown by clear and convincing evidence that it is likely the child will be adopted, the burden shifts to the parents to prove that termination of parental rights would be detrimental to the child. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574 (*Autumn H.*); *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373.) The standard of review on appeal is whether the trial court's finding that the parent-child bond exception did not apply in this case is supported by substantial evidence. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576-577.)

We determine whether there is substantial evidence to support the trial court's ruling by reviewing the evidence most favorably to the prevailing party and indulging in

all legitimate and reasonable inferences to uphold the court's ruling. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) If the court's ruling is supported by substantial evidence, the reviewing court must affirm the court's rejection of the exceptions to termination of parental rights under section 366.26, subdivision (c). (*Autumn H., supra*, 27 Cal.App.4th at p. 576.)

Here, the evidence is clear that mother "maintained regular visitation and contact with" her children during the course of reunification services. The question is whether the children would "benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

Although the statute does not define the precise nature of the "benefit" necessary in order for the exception to apply, it is well settled that the benefit must derive from the parent/child relationship, such that the child would suffer detriment from its loss. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) To establish a parent/child relationship, showing of "frequent and loving contact" is not enough. There must be a " 'substantial, positive emotional attachment' " between the parent and the child. (*Ibid.*; see also: *Autumn H., supra*, 27 Cal.App.4th at p. 575.) Further, this parent/child relationship must promote the growth and well being of the child to such a degree that it outweighs the well being the child would gain in a permanent home with a new, adoptive parent. (*In re Lorenzo C. supra*, 54 Cal.App.4th at p. 1342.)

Here, the evidence does not support a finding that the children would "benefit from a continuing relationship" contemplated by the statute. While it is clear mother had a loving relationship with the children, who enjoyed her visits, this alone is not sufficient to demonstrate a benefit to the children in maintaining the legal parent-child relationship outweighs the benefit they would receive through the permanence of adoption. "Interaction between [a] natural parent and child will always confer some incidental benefit to the child. . . . The exception applies only where the court finds regular visits

and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Of particular importance here is the fact that despite dependency proceedings and a year of reunification services, mother still did not believe that her husband had sexually molested B.A. B.A. consistently expressed that she felt unsafe around mother, and did not feel she could protect her, or her siblings because of mother’s unwillingness to accept B.A.’s abuse. B.A. told the court she wanted to be adopted by her grandparents because they would keep her, and her siblings safe. This evidence supports the trial court’s finding that a continued parent-child relationship between mother and her children would not outweigh their need for stability in the permanence of adoption.

Mother argues this case is similar to *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*), in which the court of appeal reversed the trial court’s ruling that the parent-child bond did not apply. The court determined that the relationship between the mother and her three children was such that termination of parental rights would be detrimental to them. The important distinction between *Amber M.* and the present case is that in *Amber M.*, the mother presented the opinion of numerous experts who testified specifically about the nature of the mother’s relationship with each of her children, and the fact that in their opinion, it would be detrimental to sever that relationship. (*Id.* at pp. 689-690.) The sole dissenting opinion came from the social worker, who favored adoption as the permanent plan for the children. (*Id.* at p. 690.)

While there are factual similarities between *Amber M.* and the present case, the evidence before the courts was quite different. Here, unlike *Amber M.*, there was no expert evidence other than the social worker, who testified that the mother-child relationship did not outweigh the benefit of a permanent plan for the children. Moreover, mother elicited no opinion evidence to support her argument that the parent-child bond exception should apply.

We find there is substantial evidence to support the trial court's finding that the parent-child bond exception to termination of parental rights did not apply in this case.

Factors for Court Consideration in Determining the Exception

Mother asserts the trial court erred in considering the suitability of the children's placement, and the fact that their grandparents were willing to allow continued visits with mother as factors in determining the applicability of the parent-child bond exception to termination.

The record does not reflect the trial court's inappropriate use of the children's placement or the fact that the grandparents were willing to adopt them in considering the applicability of the parent-child bond exception to termination. In making its determination, the court specifically stated, "Now as far as the legal aspects of what I'm required to do and the things I must consider, clearly, . . . adoption is the priority. I am convinced, by a clear and convincing standard that the children are adoptable. And at this point, I need to consider the exception, the regular visitation, and [the] continuing benefit of relationship, that exception, and there are two prongs to that exception: One is whether regular visitation occurred, and that would be in the context of the visitation that was available to the mother, in this case. That visitation did occur, although, as I mentioned earlier, it was stopped by . . . the social worker, because of what she thought was undue influence and also, some other aspects." The court went on to consider the second prong of the exception, whether there would be a benefit from continuing the relationship between mother and the children. With regard to B.A., the court stated that adoption was appropriate for her, and there would be no benefit of her continued relationship with her mother. The court noted earlier in the proceedings that B.A. had testified that she was in fear about her mother's ability to protect her and her siblings, and that this was the reason for adoption as the permanent plan.

With regard to the younger siblings, the court noted it considered guardianship as an option, but again referred to the need of safety and stability, and B.A.'s ongoing fear for the safety of her siblings.

At no point during the proceedings in which the court was referring to the "legal aspects" of its findings did it refer to the grandparents, and whether they would adopt the children. The court did address the fact that it would encourage the grandparents to continue to allow visitation with the mother, with the understanding that they would be in control of the visitation. We do not construe the court's comments regarding the grandparents to be evidence the court considered them as a factor in determining the parent-child bond exception did not apply.

Both parties in this appeal discuss the case of *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*), in which the Fourth District Court of Appeal held the trial court improperly considered the child's relationship with her grandparent in determining that the parent-child bond exception did not apply. In particular, the *S.B.* court was troubled by the fact that the trial court considered that any detriment to the child from termination of the parent-child relationship would be ameliorated in time by the child's strong relationship with her grandmother. (*Id.* at p. 299-300.) The Court of Appeal opined that consideration of the strength of the child's relationship with his caregiver and prospective adoptive parent was not appropriate when determining if the parent-child bond exception to termination should apply. (*Ibid.*)

The Department argues we should find that *S.B.* was incorrectly reasoned. However, we need not reach such conclusion. We do not find *S.B.* applies to this case. Here, unlike *S.B.*, the court did not consider the strength of the children's relationship with the grandparents as a reason in finding the parent-child bond relationship exception to termination did not apply. Instead, the court appropriately focused on whether the children would benefit from continuing their relationship with the mother. The court was

primarily concerned with the fact that mother was sill unwilling to accept the fact that her husband had sexually abused B.A., and B.A.'s ongoing fear that mother would not protect her or her siblings from abuse. These facts, rather than the children's relationship with their grandparents, were paramount to the court in determining the children would not benefit from continuing their relationship with mother.

DISPOSITION

The order appealed from is affirmed.

RUSHING, P.J.

WE CONCUR:

ELIA, J.

DUFFY, J.